FILED March 9, 2010

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
MARVIN VERNIS SMITH,
Defendant and Appellant

No. G040107.

(Super. Ct. No. 07CF1791)

OPINION

Appeal from a judgment of the Superior Court of Orange County,
Dan McNerney, Judge. Reversed.

Riordan & Horgan, Dennis P. Riordan, Donald M. Horgan and Benjamin Owens for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Robin Derman, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court sentenced defendant Marvin Vernis Smith to 25 years to life in prison after a jury convicted him of first degree murder for the death of his wife Minnie Smith. On appeal, defendant asserts several claims of evidentiary and instructional error. We agree the evidence failed to support the trial court's decision to instruct the jury on aider and abettor liability and that it prejudicially erred in doing so. Therefore, we reverse the judgment.

FACTS

Shortly after 6:30p.m. on December, 15, 2005, police officers went to the home of defendant and his wife in response to defendant's 911 call reporting he believed an intruder was in the residence. After entering the house, the police found Smith on the floor of the upstairs master bedroom dead from blunt force injuries to her head. Subsequent investigation determined the fatal blows came from a log roller kept next to the downstairs fireplace. The victim was lying face down, wearing a nightshirt covering only the upper part of her body with her hands and arms bound behind her back by a wire coat hanger tied around the wrists. One foot missing a sock had bum marks. Investigators found matches, charred material, and pieces of duct tape near the body.

The police also found evidence of a break-in. A kitchen window was open with the outer screen removed. Just inside the window, a vase lay on its side on the floor. Drawers were open in several rooms throughout the house. In the master bedroom closet, a portion of the carpeting had been pulled back disclosing a floor safe with the lid open and no valuables inside of it.

When questioned later that evening about valuables kept in the home, defendant specifically mentioned a diamond encrusted gold medallion, a diamond encrusted Cadillac emblem, and a diamond ring he kept in the master bedroom armoire.

Defendant participated with the police in a videotaped walk-through of the house one week later. Before the walk-through, the police replaced the lid to the floor safe and covered it with the carpet. The aforementioned jewelry items plus a bottle of liquor were the only things defendant identified as missing. Defendant claimed the safe should contain his wife's jewelry and $30,000 in cash. The police arrested him the next day after discovering bags with the missing jewelry, Smith's social security card, and her other valuables in the trunk of his car inside plastic bags wrapped with duct tape.

The prosecution theorized that defendant killed his wife on the morning of December 15 and then staged the home to appear as if it had been burglarized. In addition to discovering Smith's body next to an unmade bed dressed only in a nightshirt with a matching nightcap underneath her head, an autopsy revealed she had no food in her stomach. A police officer who saw the body the evening of December 15, observed dried streaks of blood ran on the victim's face and dried blood on the carpet under her head. Bennie Thomas, Smith's son, testified he called his mother around 9:00a.m. on December 15, but she did not answer the phone and, contrary to her usual habit, did not return his call within an hour.

The pathologist who examined Smith's body testified to the absence of bruising on her wrists indicated the wire hanger used to bind the hands and arms had been affixed at or about the time of her death and that she had not struggled with her attacker. An investigator who examined the body at the home the day after the murder opined Smith died sometime between 5:30a.m. and 5:30p.m. on December 15.

The duct tape found near Smith's body came from the same roll of tape used on the bags containing the jewelry found in defendant's car and found in the garage of the residence. Forensic testing

found defendant's DNA profile on the log roller below the handle, one of the burned matchsticks, and the duct tape next to the victim's body, plus the duct tape used to wrap the jewelry found in his car.

A neighbor's tool box was discovered adjacent to the wall separating that yard from the Smith's residence, but a police officer noted there was no disturbance of any dust or debris that would suggest a person had stood on the tool box or climbed over the wall. Nor was there any evidence someone had traversed the yard between the block wall and kitchen window. There were no foot prints in the planter below the window and the screen removed from it had been placed where it would have been in the way if a burglar attempted to leave the residence by that route. Nor was there any scuffing on the window sill. The ceramic vase lying on the floor below the window was not damaged. The drawers removed from furniture had been neatly stacked and the contents of some drawers did not appear to have been disturbed. Although the master bathroom was ransacked, the police found a gun, an item considered to have "a high street value," in one of the drawers. A second six-foot tall safe located in the garage that contained several guns and a twelve-inch high stack of $2 bills was left undisturbed as were wrapped Christmas gifts kept in a downstairs bedroom.

Defendant made inconsistent statements. During the 911 call and when questioned by the police later that evening, he claimed to have entered the house through the front door. Thomas testified defendant's practice was to enter the house through the garage where the police found Smith's car. Defendant told the police he believed his wife was not home, in part because the front sunshade screen, which she usually kept in the up position, was down. He also claimed he could not find the switch to raise the sunshade screen. The police officers who responded to defendant's 911 call testified the screen was up when they arrived. One of the officers participating in the crime scene investigation

testified the sunshade screen switch glowed in the dark. When questioned by the police on December 15, defendant said he and his wife never locked the floor safe in the master bedroom closet. During the walk through one week later defendant claimed his wife kept the floor safe locked and denied he knew the combination to it.

The prosecution also presented evidence that during the marriage defendant and his wife had fights and defendant engaged in extramarital affairs with other women. Samuel Matthews, who had worked at a liquor store owned by defendant, testified defendant "would ... say he wish[ed] it was just him and his dog or just him by himself." On another occasion, defendant told Matthews "the only way to get out of the marriage [was] they had to die," because he was "not going to give Minnie half of what I got so another man can live off of it."

The defense claimed defendant was not present when the murder occurred and could not have committed it himself. He presented evidence disputing the prosecution's claims concerning the time of death, the staging of a burglary, and the state of the marriage. The defense also presented evidence detailing defendant's whereabouts on December 15, and that he had undergone rotator cuff surgery on his left shoulder in early November 2005 and would not have been able to strike the fatal blows.

Two witnesses testified to seeing a white vehicle in the Smith's driveway on the afternoon of December 15. Ada Moses, defendant's ex-wife, testified she saw the jewelry found in defendant's car several months before the murder when she placed some gardening tools in the trunk in preparation for visit of their daughter's grave. In addition, defendant presented evidence suggesting Matthews may have killed Smith. Matthews purportedly owed defendant a substantial amount of money. He knew defendant had safes in the house and was aware of some details about the crime.

DISCUSSION

1. Introduction

During opening statement, the prosecutor asserted defendant "murdered his wife ... and then he staged the crime scene to make it look like a burglary ... to avoid detection.",After the close of evidence, he asked the court instruct the jury on aider and abettor liability. "The jury doesn't have to necessarily believe, and I think defense counsel will argue that the defendant did not or could not have committed the crime himself. But that doesn't mean that if he didn't commit the crime himself, that if they find that he aided and abetted in the crime that he's still not guilty of the crime. [¶] So if he didn't swing the murder weapon, it doesn't mean he's not guilty of the crime."

Over defense counsel's objection, the trial court agreed to instruct the jury using CALCRIM Nos. 400 and 401. Noting the "considerable evidence ... from both sides regarding the issue of whether or not [defendant] had the ability to use this particular object in a particular manner to inflict the blow that resulted in Mrs. Smith's death" and "with respect to circumstances that point to [defendant] having been involved," the court ruled "the instruction[s] should be given, based on the current state of the evidence so that the jury's not left ... without guidance from the court as to what do we do ... [¶] [i]f we determine that [defendant] was involved in this, but he's not the person who actually hit Mrs. Smith with that fireplace tool .... "

2. Sufficiency of the Evidence Supporting an Aiding and Abetting Theory

Defendant challenged use of an aiding and abetting theory, in part, arguing the evidence did not support this theory because "liability may not be predicated on a defendant's aiding of an unknown

principal, 'created from the whole cloth of pure speculation.' [Citation.]" Respondent claims that "as the trial court noted, there was evidence, primarily advanced by the defense, that someone other than [defendant] wielded the fireplace tool," but, given the prosecution's evidence of his involvement, "[e]ven if the jury accepted the defense theory on this point, it could nonetheless have concluded that [defendant] accomplished the murder with the assistance of another." Defendant has the better argument.

"'The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support conviction on that theory. [Citation.] To determine whether there is substantial evidence to support a conviction we must view the record in a light most favorable to conviction, resolving all conflicts in the evidence and drawing all reasonable inferences in support of conviction. We may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable fact finder could find the defendant guilty on the theory presented. [Citation.]' [Citations.]" *(People v. Campbell* (1994) 25 Cal.App.4th 402, 408.)

Under Penal Code section 31, "All persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, ... are principals in any crime so committed," and therefore one "who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. [Citation.]" *(People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) But "for a defendant to be found guilty under an aiding and abetting theory, someone other than the defendant must be proven to have attempted or committed a crime; i.e., absent proof of a predicate offense, conviction on an aiding and abetting theory cannot be sustained." *(People v. Perez* (2005) 35

Cal.4th 1219, 1225.) "Without proof of a criminal act by [a perpetrator] to which [the defendant] contributed, the prosecution could not convict [the defendant] as an aider and abettor. [Citations.]" *(Id.* at p. 1227.)

In *People v. Singleton* (1987) 196 Cal.App.3d 488, after stopping a car in which the defendant was riding as a passenger, the police found numerous bindles of cocaine in one of her boots. Charged with possessing cocaine for sale, the defendant claimed the driver gave her the bindles and asked her to hide them for him. The trial court instructed the jury on an aiding and abetting liability theory because the prosecutor contended she could be found guilty if she assisted someone, other than the driver, sell the cocaine.

The Court of Appeal reversed. "[W]e can fmd no evidentiary foundation for accomplice liability hinged solely upon the prosecution's theory that [the] defendant aided and abetted an anonymous 'Mr. X.' In cases which have upheld accomplice liability in narcotics transactions, there has always been evidence of a principal whom the defendant in some way knowingly assisted in the accomplishment of a criminal objective. [Citations.] We have found no case, however, and none has been cited to us, where guilt of aiding and abetting has been upheld despite the total absence of any proof of a perpetrator. We cannot accept the notion that a defendant's conviction can rest solely on a theory of aiding, promoting, encouraging, or instigating a principal created from the whole cloth of pure speculation." *(People v. Singleton, supra,* 196 Cal.App.3d at p. 493.)

The prosecution's evidence supported a conclusion defendant killed Smith. His DNA profile was found on the murder weapon and artifacts found around her body. He made inconsistent statements to the police. The evidence suggested the purported burglary had been staged. The duct tape found near Smith's body also contained defendant's DNA profile

and came from the same roll used to wrap up the valuables discovered in defendant's car that he claimed were "missing" after the burglary.

On the other hand, defendant presented testimony the murder occurred after he left for work on December 15 and that he did not return home that day until shortly before making the 911 call. In addition, the defense presented evidence defendant's recent rotator cuff surgery rendered it impossible for him to swing the log roller with sufficient force to kill his wife as claimed by the prosecution. Thus, while there was evidence that Smith was murdered, other than by defendant, no proof was presented that another person participated in accomplishing this criminal enterprise.

Respondent relies on *People v. Staten* (2000) 24 Cal. 4th 434 to support the use of aiding and abetting instructions in this case. There the defendant was charged with and convicted of murdering his parents. At trial, over a defense objection, the trial court gave aiding and abetting instruction noting, "'the People's theory is that the defendant was involved; that they have no direct evidence that he was the perpetrator, even though that's also their theory, that (A) he was the perpetrator; (B), if he wasn't, he's an aider and abettor.'" *(Id.* at p. 457.)

The Supreme Court affirmed the conviction, rejecting the defendant's claim the trial court erred by giving aiding and abetting instructions because "no evidence was presented from which the jurors could reasonably infer that he had arranged with an accomplice to murder his parents." *(People v. Staten, supra,* 24 Cal. 4th at p. 458.) "There was sufficient basis for the jury to find from the evidence that defendant could have been guilty as an aider and abettor: he had discussed the idea of killing his parents with friends, and the lack of forcible entry on the night of the murders suggested that he either committed the killings himself or left the house unlocked for the actual killers. His defense that he

was not at home at the time of the killings and that one person could not have committed both murders was not inconsistent with a theory of aiding and abetting. If the jury had accepted his evidence on that point, it could nonetheless reasonably have concluded that he accomplished the murders with the aid of others." *(Id.* at pp. 458-459, fn. omitted.)

Here, unlike *Staten,* the prosecutor proceeded solely on the theory defendant killed his wife. The request for instruction on aiding and abetting came after the close of evidence because he was concerned the strength of the defense evidence might engender a reasonable doubt as to this theory in the minds of some jurors. Also, in finding the evidence sufficient to support an aiding and abetting instruction, *Staten* noted the defendant "had discussed the idea of killing his parents with friends .... " *(People v. Staten, supra,* 24 Cal. 4th at p. 458.) Other than Matthews's testimony that at some point in the past defendant had made general comments about his desire to live alone and that he would never divorce his wife, we have no evidence defendant discussed killing her with anyone or that he attempted to hire another to commit the murder.

An instruction on aiding and abetting as an alternative theory of liability is not justified merely because a defendant presents an arguably successful defense concerning his identity as the perpetrator of a crime. Thus, we conclude the evidence failed to support the giving of aiding and abetting instructions in this case.

3. Prejudice

The remaining question is whether the giving aiding and abetting instructions in this case constituted prejudicial error. We think so.

The error committed involved instructing the jury on a theory not supported by the evidence. Thus, it constituted "state law error[]" *(People v. Perez,*

supra, 35 Cal. 4th at p. 1232), and an appellate court generally "must assess the entire record, 'including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict[]' [citation]," and "affirm 'unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' [Citation.]" *(Id.* at p. 1233; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The prosecution tried this case on a theory defendant killed his wife and staged it to look like a burglar had broken into the house and killed Smith when she confronted him. In response, the defense presented evidence suggesting defendant had left for work before she was killed and that his recent surgery precluded him from striking the fatal blows in any event. Only after the close of evidence did the prosecutor, concerned about the strength of the defense evidence, ask for an instruction on aiding and abetting as an alternate theory ofliability. While the prosecutor declared aiding and abetting was "not [his] theory," he acknowledged some jurors might believe defendant was "in on [the crime], but ... not sure that he could have wielded the weapon."

During their nearly five hours of deliberations, the jurors sent out a request for some trial materials including the log roller and "medical records from [the] surgeon & physical therapist .... " This request suggests the jurors focused on whether defendant had the physical strength to beat his wife to death.

Finally, the error in giving the aiding and abetting instructions was exacerbated by the court's reading of portions of the standard instructions applicable only to the natural and probable consequences doctrine and withdrawal of one who aids and abets a crime. When a trial court erroneously instructs the jury, "'the question we ask is whether there is a reasonable likelihood that the

jury construed or applied the challenged instruction[s] in an objectionable fashion.' [Citation.]" *(People v. Osband* (1996) 13 Cal.4th 622, 679.) But where, as here, the instructions on aiding and abetting were not only unsupported by the evidence, but also referred to entirely inapplicable legal principles, it is difficult to apply the general presumption that "jurors ... understand and faithfully follow instructions.' [Citation.]" *(People v. Smith* (2007) 40 Cal .4th 483, 517-518.)

Under these circumstances, we conclude the trial court committed prejudicial error by instructing the jury on aiding and abetting as an alternate theory of
liability in this case.

DISPOSITION

The judgment is reversed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.